Supreme Court
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No. 95- 95-701 OCT 17 1995

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

ALAN WEIL, Executive Director, Colorado Department of Health Care Policy and Financing, in his official capacity,
Petitioner,
vs.
WARREN M. HERN; GRAND JUNCTION WOMEN'S CLINIC; PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS; and MAYFAIR WOMEN'S CENTER,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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46 pp

QUESTION PRESENTED FOR REVIEW

Whether a State participating in Medicaid must pay for every abortion for which federal matching funds are available, contrary to that State's constitution.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 8

I. THE COURT OF APPEALS' DECISION CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS IN *PENNHURST STATE SCHOOL AND HOSPITAL v. HALDERMAN* AND *SOUTH DAKOTA v. DOLE* BECAUSE IT CREATES A FEDERAL MANDATE FROM VAGUE AND CONTRADICTORY STATUTES AND REGULATIONS. . 8

II. THE COURT OF APPEALS' CONCLUSION THAT STATES MUST FUND ALL ABORTIONS FOR WHICH FEDERAL FUNDS ARE AVAILABLE, IN ORDER TO PARTICIPATE IN MEDICAID, WAS

TABLE OF CONTENTS

PAGE

EXPRESSLY RESERVED BY THIS COURT IN *HARRIS v. McCRAE*. . . . 15

CONCLUSION 16

TABLE OF AUTHORITIES

CASES **PAGE**

Baker v. Carr, 369 U.S. 186 (1962) 15

Brown v. Environmental Protection Agency, 521 F.2d 827 (9th Cir. 1975) 15

Conroy v. Aniskoff, 113 S. Ct. 1562 (1993) 14

Elizabeth Blackwell Health Care for Women v. Knoll, 61 F.3d 170 (3d Cir. 1995) 10

Environmental Protection Agency v. Maryland, 431 U.S. 99 (1977), *on remand*, 566 F.2d 665 (9th Cir. 1977) 15

Harris v. McCrae, 448 U.S. 297 (1980) 6, 15, 16

Hope Medical Group for Women v. Edwards, ___ F.3d ____ (5th Cir. 1995), *reh'g denied*, ___ F.3d ____ 10

Little Rock Family Planning Services v. Dalton, 60 F.3d 497 (8th Cir. 1995), *reh'g denied*, ____ F.3d. ____ 10

Madison Galleries, Ltd. v. United States, 870 F.2d 627 (Fed. Cir. 1989) 13

New York v. United States, 505 U.S. 144 (1992) 14

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) 8, 9, 11

TABLE OF AUTHORITIES

CASES	PAGE
Ratzlaff v. United States, __ U.S. __, 114 S. Ct. 655 (1994)	14
Rizzo v. Goode, 423 U.S. 362 (1976)	15
Roe v. Wade, 410 U.S. 113 (1973)	5
S & E Contractors, Inc. v. United States, 406 U.S. 6 (1972)	14
South Dakota v. Dole, 483 U.S. 203 (1987)	8, 9, 11, 14
Suter v. Artist M., 503 U.S. 347 (1993)	12
United States v. Will, 449 U.S. 200 (1980)	13
Urbish v. Lamm, 761 P.2d 756 (Colo. 1988)	6
Visser v. Taylor, 756 F. Supp. 501 (D. Kan. 1990)	11
Weaver v. Reagan, 886 F.2d 194 (8th Cir. 1989)	11
White v. Beal, 555 F.2d 1146 (3d Cir. 1977)	11

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS **PAGE**

Colo. Const. art. V, § 50 . . . . . 2, 6, 7

STATUTES

28 U.S.C. § 1254(1) (1988) 2

28 U.S.C. §§ 1331, 2201, and 2202 7

42 U.S.C. § 1396a(a)(17) 8, 11

42 U.S.C. § 1396a(a)(17)(A) 3, 10

42 U.S.C. § 1983 12

42 U.S.C. §§ 1396 to 1396v 5-7, 9, 11-13, 15, 16

1993 Colo. Sess. L. ch. 230 1

Pub. L. No. 101-166, § 204, 103 Stat. 1159 (1989) . . 6

Section 509 of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1994, Pub. L. No. 103-112, 107 Stat. 1082 (1993) . . 3-6, 13, 14, 16

TABLE OF AUTHORITIES

RULES **PAGE**

42 C.F.R. parts 430 to 456 5

42 C.F.R. § 440.230(c) 4, 10

42 C.F.R. § 440.230(d) 8

42 C.F.R. § 441.202 . . . . . 3, 11

42 C.F.R. § 441.203 . . . . . 4, 11

42 C.F.R. §§ 441.200 to .208 6

Fed. R. Civ. P. 65(a)(2) 7

Rule 35, Rules of the Supreme Court of the United States (Oct. 2, 1995) 1

OTHER AUTHORITIES

Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417 14

No. 95-

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

ALAN WEIL, Executive Director, Colorado Department of Health Care Policy and Financing, in his official capacity,
Petitioner,
vs.
WARREN M. HERN; GRAND JUNCTION WOMEN'S CLINIC; PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS; and MAYFAIR WOMEN'S CENTER,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

The Executive Director of the Colorado Department of Health Care Policy and Financing petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.[1]

[1] This action was originally filed against Karen Beye, Executive Director of the Colorado Department of Social Services, the state agency formerly responsible for administering the Colorado Medicaid program. After this action was filed, the Colorado General Assembly reorganized three cabinet departments, including the Department of Social Services. The Colorado Department of Health Care Policy and Financing is now responsible for administering the Colorado Medicaid program. *See* 1993 Colo. Sess. L. ch. 230. *Cf.* Rule 35, Rules of the Supreme Court of the United States (Oct. 2, 1995).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. B) is reported at 57 F.3d 906. The opinion of the United States District Court for the District of Colorado (Pet. App. C) has not been published.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) (1988). The opinion of the United State Court of Appeals for the Tenth Circuit was delivered on June 8, 1995, and a timely petition for rehearing was denied on July 19, 1995. Pet. App. A.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Article V, section 50 of the Colorado Constitution provides in relevant part:

> No public funds shall be used by the State of Colorado, its agencies or political subdivisions to pay or otherwise reimburse, either directly or indirectly, any person, agency or facility for the performance of any induced abortion, *provided however*, that the General Assembly, by specific bill, may authorize and appropriate funds to be used for those medical services necessary to prevent the death of either a pregnant woman or her

> unborn child under circumstances where every reasonable effort is made to preserve the life of each.

Section 509 of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1994, Pub. L. No. 103-112, 107 Stat. 1082, 1113 (1993), popularly known as the "Hyde Amendment," provides in relevant part:

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

42 U.S.C. § 1396a(a)(17)(A) provides in relevant part:

> A State plan for medical assistance must . . . .
>
> (17) [i]nclude reasonable standards . . . for determining . . . the extent of medical assistance which
>
> (A) are consistent with the objectives of this subchapter. . . .

42 C.F.R. § 441.202 provides:

> FFP [Federal Financial Participation] is not available in expenditures for an abortion

unless the conditions specified in §§ 441.203 and 441.206 are met.

42 C.F.R. § 441.203 provides, in relevant part:

> FFP is available in expenditures for an abortion when a physician has found, and certified in writing to the Medicaid agency, that on the basis of his professional judgment, the life of the mother would be endangered if the fetus were carried to term.

42 C.F.R. § 440.230(c) provides in pertinent part:

> The Medicaid agency may not arbitrarily deny or reduce the amount, duration or scope of a required service . . . solely because of the diagnosis, type of illness, or condition.

STATEMENT OF THE CASE

This case involves the state constitutional provision prohibiting the use of state funds to pay for abortion procedures except to save the life of the mother. It arises from a recent change made in directory language Congress has included in human services appropriations bills continuously since 1976.

Since 1984, Colorado's state constitution has prohibited the use of state funds to pay for abortion procedures except to save the life of the mother. At the time it was adopted, this provision paralleled the federal Hyde Amendment, which placed the same prohibition on federal Medicaid funds.

Medicaid. Petitioner is the Executive Director of the agency that administers the Medicaid program in Colorado. "Medicaid" is the popular name of a joint federal and State program to provide medical assistance to the poor, the disabled, and the otherwise needy.

In order to participate in Medicaid, and qualify for matching federal funds, States are required to submit a plan setting forth the terms and conditions of the medical assistance they will provide. State plans must meet the requirements set forth in Title XIX of the Social Security Act, codified at 42 U.S.C. §§ 1396 to 1396v, and in the implementing regulations found at 42 C.F.R. parts 430 to 456. However, the statutory structure of Medicaid does not demand that States adopt nationally uniform programs. Instead, it allows States to participate if their state plans include "reasonable standards . . . for determining . . . the extent of medical assistance which . . . are consistent with the objectives of" Title XIX. Colorado has participated in Medicaid continuously since 1966.

Federal law regarding abortion funding under Medicaid. In 1965, when the Medicaid program began, abortion was illegal in virtually every State. Accordingly, at the time Medicaid was established, no one understood Title XIX to require States to fund abortions of any kind.

After this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), abortion became more widely available. In 1976, Congress enacted the first Hyde Amendment, a rider to an appropriation bill restricting the availability of federal funds to pay for abortions. Congress has enacted some version of the Hyde Amendment each year since 1976. The version adopted from 1982 to 1992 prohibited the use of federal funds for abortions "except where the life of the mother would be endangered if the fetus were carried to

term." *See, e.g.*, Pub. L. No. 101-166, § 204, 103 Stat. 1159, 1177 (1989). In *Harris v. McCrae*, 448 U.S. 297 (1980), this Court held that Title XIX did not require the States participating in Medicaid to pay for any abortions for which federal matching funds were not available. Thus, from 1982 to 1992, federal law did not permit participating States to pay for abortions with federal funds, except those necessary to save the life of the mother.

Colorado law regarding funding for abortions under medicaid. In 1984, the people of Colorado adopted an amendment to the state constitution which prohibits the use of any public funds to pay for abortions except when necessary to protect the life of the mother. Colo. Const. art. V, § 50. *See also Urbish v. Lamm*, 761 P.2d 756 (Colo. 1988). This provision forbids Colorado from contributing any funds towards the cost of any other abortion even if federal Medicaid funds are available to pay for those costs. An attempt to repeal this provision was rejected by Colorado voters in 1988.

Federal regulations regarding medicaid funding for abortions. On the federal level, the Medicaid program is administered by the Department of Health and Human Services (HHS) through its Health Care Financing Administration (HCFA). In 1987, HHS promulgated regulations providing that federal funds are not available to pay for any abortions unless the abortion is necessary to save the life of the mother. 42 C.F.R. §§ 441.200 to .208.

The 1993 Hyde Amendment. In October 1993, Congress enacted a modified Hyde Amendment permitting, but not mandating, the use of federal funds to pay for abortions, not only when necessary to preserve the life of the mother, but also in cases where the abortion terminates a pregnancy resulting from an act of rape or incest. Section

509 of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1994, Pub. L. No. 103-112, 107 Stat. 1082, 1113. Congress, however, did *not* make any substantive changes to Title XIX.

The federal regulations limiting federal medicaid funds to those abortions where the mother's life is in danger have *not* been repealed or amended, nor has HCFA evinced any intent to do so. Even so, a HCFA official wrote a letter to state Medicaid directors in December 1993, stating her belief that States must now pay for abortions terminating pregnancies resulting from rape or incest.

District Court Proceedings. Respondents perform abortions, and they commenced an action invoking the court's jurisdiction under 28 U.S.C. §§ 1331, 2201, and 2202 in the United States District Court for the District of Colorado claiming the Colorado restriction on abortion funding conflicted with federal law. Approximately six months after the action was filed, the district court received evidence and heard arguments on Respondents' motion for a preliminary injunction. By agreement of the parties, the hearing on the motion was consolidated with the trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2). The district court held that federal law required Colorado to pay for abortions terminating pregnancies resulting from rape or incest as long as it participated in Medicaid, notwithstanding Colo. Const. art. V, § 50. Pet. App. C-1 to C-4.

Court of Appeals Proceedings. Petitioner pursued a timely appeal to the United States Court of Appeals for the Tenth Circuit. The Court of Appeals noted "the only issue here is whether Colorado's [abortion] funding restriction contravenes the requirements of Title XIX and accompanying regulations." 57 F.3d at 909. The Court of Appeals held

the funding restriction contravened federal law for two different reasons.

First, the Court of Appeals held the funding restriction violates 42 C.F.R. § 440.230(d) because it "impermissibly discriminates in its coverage of abortions on the basis of a patient's diagnosis and condition." 57 F.3d at 910. Second, the Court of Appeals held the funding restriction conflicted with 42 U.S.C. § 1396a(a)(17) because it "is inconsistent with the basic objective of Title XIX -- to provide qualified individuals with medically necessary care." 56 F.3d at 910-911.

Therefore, despite the absence of any change in regulations or in substantive law, the Tenth Circuit interpreted Congress' statement about the availability of federal funds as a mandate overriding the Colorado constitutional prohibition on abortion funding.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS IN *PENNHURST STATE SCHOOL AND HOSPITAL v. HALDERMAN* AND *SOUTH DAKOTA v. DOLE* BECAUSE IT CREATES A FEDERAL MANDATE FROM VAGUE AND CONTRADICTORY STATUTES AND REGULATIONS.

The Court of Appeals held that Colorado may not receive matching federal Medicaid funds unless it agrees to pay for abortions in the cases of rape or incest. The Court

of Appeals purported to find this requirement in the murky shadows of the language of Title XIX and its implementing regulations. However, the oblique and obscure language of Title XIX cannot give rise to the requirement that the Court of Appeals has discovered in this case.

As this Court has held:

> [I]f Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation."

South Dakota v. Dole, 483 U.S. 203, 207 (1987) (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)).

Title XIX and its implementing regulations contain no requirement that States pay for any abortions, much less a requirement that is unambiguous, allowing the States to make an informed choice as to whether or not to participate in medicaid. It is inconsistent with basic notions of federalism for a federal court to nullify a popularly adopted state constitutional provision where the federal requirement, if it exists at all, is hidden in language so unclear and ambiguous that the States have no notice of it.

These concerns have particular force in the instant case. The federal government and the State of Colorado each contribute more than $700 million annually to Colorado's Medicaid program, providing necessary medical services to nearly 300,000 needy persons each year. If the Court of Appeals' ruling stands, it would jeopardize Colorado's continued participation in Medicaid. Thus, for the cost of a very few abortion procedures each year, hundreds of thousands of citizens will suffer the loss of

necessary medical services. Such a result should not be precipitated by an inference made from vague statutory language, equivocal legislative history, and contrary to clear and unmistakable federal regulations.[2]

A. The Court of Appeals held that Colorado's constitutional restriction on abortion funding violated 42 U.S.C. § 1396a(a)(17)(A) and 42 C.F.R. § 440.230(c).[3] Neither of these authorities contain an unambiguous requirement to fund abortions. Each of these authorities will be examined in turn.

The Court of Appeals held the Colorado Constitution violates 42 C.F.R. § 440.230(c). This regulation provides, in pertinent part:

> The Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service . . . to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.

This regulation, on its face, does not contain any express requirement that the States pay for any abortions. Instead, the regulation addressed the issue of discrimination against individuals because they have an unpopular or

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[2] These issues sparked similar litigation in at least three other circuit courts. *See Elizabeth Blackwell Health Care for Women v. Knoll*, 61 F.3d 170 (3d Cir. 1995), *reh'g denied by an equally divided court*; *Hope Medical Group for Women v. Edwards*, ___ F.3d ____ (5th Cir. 1995), *reh'g denied*, ___ F.3d ____; and *Little Rock Family Planning Services v. Dalton*, 60 F.3d 497 (8th Cir. 1995), *reh'g denied*, ____ F.3d. ____.

[3] We should note that neither the respondents nor the district court relied on those provisions.

expensive diagnosis. *See, e.g., Weaver v. Reagan*, 886 F.2d 194 (8th Cir. 1989) (State cannot discriminate against patients with AIDS); *Visser v. Taylor*, 756 F. Supp. 501 (D. Kan. 1990) (State cannot discriminate against schizophrenics). Similarly, a State cannot provide eyeglasses to persons with one diagnosis (*e.g.*, cataracts) and deny eyeglasses to persons with a different diagnosis (*e.g.*, refractive problems). *White v. Beal*, 555 F.2d 1146 (3d Cir. 1977).

In this case, Colorado provides abundant medical assistance to pregnant women. It pays for their prescription drugs, prenatal care, and the delivery of their children. Colorado will even pay for an abortion if it is necessary to save the mother's life. Inasmuch as Colorado does not discriminate on the basis of diagnosis, it does not violate this regulation.

Indeed, it is absurd to say the Colorado Constitution is inconsistent with federal regulations regarding abortion funding, when the only regulations specifically dealing with abortion contain the same restriction. 42 C.F.R. §§ 441.202 and 441.203. In effect, the Court of Appeals concluded that Colorado must pay for abortions under federal regulations, even though the only regulations concerning abortion expressly prohibit such payment, and the regulation purportedly creating the requirement does not even mention abortion, rape, incest, or any other topic relevant to the issues in this case. *Dole* and *Pennhurst* flatly forbid a federal mandate based on such contradictory language.

B. The Court of Appeals also held that Colorado's restriction violates 42 U.S.C. § 1396a(a)(17). This provision of Title XIX permits States to include "reasonable standards" in their state plans for determining "the extent of medical assistance . . . which . . . are consistent with the

objectives of this subchapter. . . ."[4] Obviously, this is not a clear and unambiguous congressional mandate that States pay for abortions. Rather, this language is the very model of vague and imprecise requirement. It contains virtually no standards, and invites courts to create a federal common law of health care policy, depending upon their view of what is "reasonable" and what the "objectives" of Title XIX are. Surely, the States are entitled to more notice than the language of this statute.

Even so, Colorado's abortion funding restriction does not violate even this vague requirement. The Court of Appeals correctly observed that the "basic objective" of Title XIX is to "provide qualified individuals with *medically necessary care*." 57 F.3d at 910-911 (emphasis supplied). However, the procedures at issue in this case are not defined by their medical necessity but by whether or not the pregnancy was the result of rape or incest. There may be any number of philosophical or public policy reasons to finance abortions in such cases, but there are no *medical* reasons to do so. Indeed, the Court of Appeals' decision requires Colorado to finance abortions in cases where there are no *medical* complications in the pregnancy at all.

Rape and incest are crimes perpetrated on innocent victims. However, the tragedy of rape and incest is not a disease or medical condition. Failure to pay for abortions

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[4] This language is not only too vague to create a requirement that the federal government can impose on the States, it is also too vague to create a private cause of action enforceable under 42 U.S.C. § 1983. *Suter v. Artist M.*, 503 U.S. 347 (1993). Just like the "reasonable effort" language that this Court found unenforceable in *Suter*, Title XIX's language that standards be "reasonable" and "consistent with the objectives" of Title XIX are unenforceable.

in the case of rape or incest is not a failure to pay for "medically necessary care." Nor is it inconsistent with the objectives of Title XIX, especially where Congress itself, without ever amending Title XIX, refused to pay for these very procedures for ten years, and where Congress has continued to deny funding for the vast majority of abortions.

C. The Court of Appeals further attempted to bolster its holding by reference to statements from various members of Congress during the debate on the 1993 version of the Hyde Amendment. 57 F.3d at 912-913. However, the issue at bar is the meaning of Title XIX, not the meaning of the 1993 version of the Hyde Amendment. The Hyde Amendment only permits the expenditure of federal funds; it does not contain any language that even arguably creates any obligations on the part of the States. The Court of Appeals did *not* hold that the Hyde Amendment created any such obligations and correctly stated, "the only issue here is whether Colorado's funding restriction contravenes the requirements of Title XIX and accompanying regulations." 57 F.3d at 909.[5]

In any event, it is unclear what value the legislative history of the 1993 Hyde Amendment could have. All of the relevant sections of Title XIX were adopted in 1965, and comments by members of Congress nearly 30 years later shed no light on what was intended when Title XIX was passed. *Madison Galleries, Ltd. v. United States*, 870 F.2d 627, 632-33 (Fed. Cir. 1989) ("A law may be amended, superseded or rescinded by another law, but not by subsequent legislative history.") Further, all of the comments cited by the Court of Appeals concern the

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[5] Indeed, as an appropriation measure, the Hyde Amendment could not serve to amend a substantive law such as Title XIX. *Cf. United States v. Will*, 449 U.S. 200 (1980).

anticipated consequences if *no* Hyde Amendment were passed. None of the comments cited addressed the effect of the version of the Hyde Amendment that *was* actually passed; no opinion was offered on whether a state restriction on abortion funding that was similar to, but not identical with, the Hyde Amendment was permissible.[6]

As noted above, Congress can only attach conditions to the receipt of federal funds if it does so unambiguously. *Dole*, 483 U.S. at 207. As this Court has repeatedly said, courts should not resort to legislative history unless the statute is ambiguous. *Ratzlaff v. United States*, __ U.S. __, 114 S. Ct. 655, 662 n.18 (1994). If it is necessary to resort to legislative history, such a condition is inherently ambiguous under *Dole*. To hold otherwise would effectively require participating States to appropriate "a congressionally compelled subsidy" of which they had no notice. *New York v. United States*, 505 U.S. 144, 175 (1992). Such congressionally mandated appropriations "commandeer" the State legislative process, *New York*, 505 U.S. at 161, abridge "the right of the people" of the several States "to pass their

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[6] Even so,

> In construing laws we have been extremely wary of testimony before committee hearings and of debates on the floor of Congress save for precise analyses of statutory phrases by the sponsor of the proposed laws. . . . The reason is the caveat of Mr. Justice Holmes, "We do not inquire what the legislature meant; we ask only what the statute means."

S & E Contractors, Inc. v. United States, 406 U.S. 6, 13 n.9 (1972) (quoting Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419. *See also Conroy v. Aniskoff*, 113 S. Ct. 1562, 1568 n.2 (1993) (Scalia, J., concurring).

own laws," *Baker v. Carr*, 369 U.S. 186, 222 n.48 (1962), and effectively abrogate self-government.[7] *Cf. Rizzo v. Goode*, 423 U.S. 362, 378 (1976) ("[w]here, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law.").

II. THE COURT OF APPEALS' CONCLUSION THAT STATES MUST FUND ALL ABORTIONS FOR WHICH FEDERAL FUNDS ARE AVAILABLE, IN ORDER TO PARTICIPATE IN MEDICAID, WAS EXPRESSLY RESERVED BY THIS COURT IN *HARRIS v. McCRAE*.

In this case, the Tenth Circuit held that Title XIX requires States to fund all abortions where federal funds are available. This Court expressly reserved judgment on this very issue in *Harris v. McCrae*, 448 U.S. 297 (1980), and this important legal question should be decided by this Court, rather than a lower court.

In *Harris*, the lower court held that Title XIX required States to fund all medically necessary abortions but

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[7] *Cf. Brown v. Environmental Protection Agency*, 521 F.2d 827 (9th Cir. 1975), *vacated and remanded for consideration of mootness*; *Environmental Protection Agency v. Maryland*, 431 U.S. 99 (1977), *on remand*, 566 F.2d 665 (9th Cir. 1977).

that the Hyde Amendment was a substantive amendment to Title XIX.[8]

This Court affirmed the result, "but for somewhat different reasons." 448 U.S. at 308. Indeed, this Court pointedly refused to endorse the theory that the Hyde Amendment was a substantive amendment to Title XIX: "we need not inquire . . . whether the Hyde Amendment is a substantive amendment to Title XIX." 448 U.S. at 310 n.14. Thus, the Tenth Circuit's decision in this case rests on a premise this Court has expressly refused to adopt: that Title XIX requires States to fund abortions.

If Congress may use annual appropriations riders to effectively create substantive mandates affecting Medicaid, States cannot make informed choices about whether to participate in that program. As a result, abortion funding becomes a perpetually unsettled issue. As a result, the litigation of this precise question in at least four Courts of Appeals now makes it appropriate for this Court to resolve the question it explicitly reserved in *Harris v. McCrae*.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted this 17th day of October, 1995.

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[8] "The District Court . . . conclud[ed] that even though Title XIX would otherwise have required a participating State to fund medically necessary abortions, the Hyde Amendment had substantially amended Title XIX to relieve a State of that funding obligation." 448 U.S. at 305.

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

WARREN M. HERN; GRAND JUNCTION WOMEN'S CLINIC; PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, named: Planned Parenthood of the Rocky Mountains, Inc.; MAYFAIR WOMEN'S CENTER,	)	
Plaintiffs-Appellees,	)	
v.	)	No. 94-1205
KAREN BEYE, Executive Director, State Department of Social Services, in her official capacity,	)	
Defendant-Appellant.	)	
- - - - - - - - -	)	
COLRADO STATE LEGISLATURE,	)	
Amicus Curiae.	)	

ORDER
Entered July 19, 1995

Before MOORE, ANDERSON, and TACHA, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

By:
/s/
Deputy Clerk

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

WARREN M. HERN; GRAND JUNCTION WOMEN'S CLINIC; PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, named: Planned Parenthood of the Rocky Mountains, Inc.; MAYFAIR WOMEN'S CENTER, Plaintiffs-Appellees, v. KAREN BEYE, Executive Director, State Department of Social Services, in her official capacity, Defendant-Appellant, - - - - - - - - - - - - - - COLORADO STATE LEGISLATURE, Amicus Curiae.	No. 94-1205

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. No. 93-N-2350)

Before **MOORE, ANDERSON,** and **TACHA,** Circuit Judges.

TACHA, Circuit Judge.

Plaintiffs are a physician and three women's health care facilities that provide abortion services to women in Colorado. They brought this action pursuant to 28 U.S.C. §§ 2201 and 2202 seeking to enjoin defendant Karen Beye, the executive director of Colorado's Department of Social Services, from enforcing Colo. Const. art. V, § 50, Colo. Rev. Stat. §§ 26-4-105.5, 26-4-512, and 26-15-104.5, and 10 Colo. Code Regs. § 2505-10 (8.733). These provisions forbid the Colorado state government, its agents, or its political subdivisions from funding abortions except to save the life of an expectant mother. The United States District Court for the District of Colorado held that a state that participates in the Medicaid program must fund abortions for Medicaid-eligible women to terminate pregnancies resulting from rape or incest. Accordingly, it granted plaintiffs an injunction prohibiting defendant from enforcing any of these provisions to the extent that they conflict with federal Medicaid law so long as Colorado continues to participate in Medicaid. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1), and we affirm.

I

By initiative, the voters of Colorado amended the state's constitution in 1984 to add the following section:

> No public funds shall be used by the State of Colorado, its agencies or political subdivisions to pay or otherwise reimburse, either directly or indirectly, any person, agency or facility

> for the performance of any induced abortion, PROVIDED HOWEVER, that the General Assembly, by specific bill, may authorize and appropriate funds to be used for those medical services necessary to prevent the death of either a pregnant woman or her unborn child under circumstances where every reasonable effort is made to preserve the life of each.

Colo. Const. art. V, § 50. Colorado has incorporated the mandate of section 50 into its statutes, Colo. Rev. Stat. §§ 26-4-105.5, 26-4-512, 26-15-104.5, and its code of regulations, 10 Colo. Code Regs. § 2505-10 (8.733).

In 1976, eleven years after the creation of the Medicaid program, Congress passed the Hyde Amendment, a rider attached to the appropriations bill for the Departments of Labor and Health, Education and Welfare (HEW).[1] Congress has subsequently altered the Hyde Amendment several times. The version in force from 1981 until 1993 prohibited the use of federal funds for abortions "except where the life of the mother would be endangered if the fetus were carried to term." *See, e.g.*, Pub. L. No. 101-166, § 204, 103 Stat. 1159, 1177 (1989).

On October 22, 1993, President Clinton signed into law the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-112, 107 Stat. 1082 (1993). The Act contained a new version of the Hyde Amendment that expanded the category of abortions for which federal funds are available under Medicaid. *Id.* § 509, 107 Stat. at 1113

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[1] HEW has subsequently been divided into two separate executive departments: the Department of Education and the Department of Health and Human Services (HHS).

(the 1994 Hyde Amendment). The language now in force states:

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

Id.

On November 8, 1993, plaintiffs brought this action seeking injunctive relief. They claimed that, because Colorado's funding restriction denies coverage for abortions for which federal funds are available under the 1994 Hyde Amendment -- namely, abortions to terminate pregnancies resulting from rape or incest -- Colorado's Medicaid program violates mandatory federal requirements. Defendant contended that participating states are not required to fund all abortions for which federal funds are available. Rather, she argued, the language of the Hyde Amendment is purely permissive, and the underlying federal statute and regulations leave the decision of whether to finance such services to the discretion of participating states. The district court granted plaintiffs injunctive relief, enjoining defendant from enforcing Colorado's abortion funding restriction to the extent that it conflicts with federal law.[2] Defendant now appeals.

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[2] After issuing its ruling from the bench May 5, 1994, the court issued a written order a week later that further explained its decision. *Hern v. Beye*, No. CIV-A-93 N 2350, 1994 WL 192366 (D. Colo. May 12, 1994). The two orders, when read together, are somewhat unclear as to the scope of the injunction granted.

II

Title XIX of the Social Security Act of 1965, 42 U.S.C. §§ 1396-1396v, establishes Medicaid, a jointly funded federal-state program designed to finance medical care for indigent Americans. Its stated purpose is to "enabl[e] each State, as far as practicable under the conditions in such State, to furnish . . . medical assistance [to those persons] whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396. Each state's participation in Medicaid is purely optional. *Harris v. McRae*, 448 U.S. 297, 301 (1980). But "[o]nce a State voluntarily chooses to participate in Medicaid, the State must comply with the requirements of Title XIX and applicable regulations." *Alexander v. Choate*, 469 U.S. 287, 289 n.1 (1985). Colorado participates in Medicaid through the Colorado Medical Assistance Act, Colo. Rev. Stat. §§ 26-4-101 to -704.

The Hyde Amendment circumscribes participating states' obligations to fund abortions under Medicaid. On its face, the Hyde Amendment appears to be only an appropriations measure; it merely prohibits the use of federal funds for certain services. But in *Harris v. McRae*, 448

Nevertheless, the written order of May 12 evinces the district court's intention to enjoin defendant from enforcing Colorado's abortion funding restriction only "insofar as those statutes or rules are more restrictive" than federal requirements. *Id.* at *2; *see also id.* at *1 (noting that nothing in the injunction "mandates that [defendant] go beyond federal requirements"). We therefore understand the court's injunction as prohibiting defendant -- so long as Colorado continues to accept federal Medicaid funds -- from enforcing the abortion funding restriction in a manner that conflicts with federal Medicaid law.

U.S. 297, the Supreme Court construed the Hyde Amendment as indirectly modifying states' obligations under Title XIX. The plaintiffs in *McRae* contended that, despite the Hyde Amendment, Title XIX required states to fund *all* medically necessary abortions, including those for which federal funds were unavailable. *See, id.* at 304-05. The Court, however, reasoned that "Title XIX was designed as a cooperative program of shared financial responsibility, not as a device for the Federal Government to compel a State to provide services that Congress itself is unwilling to fund." *Id.* at 309. As a result,

> by the normal operation of Title XIX, even if a State were otherwise required to include medically necessary abortions in its Medicaid plan, the withdrawal of federal funding under the Hyde Amendment would operate to relieve the State of that obligation for those abortions for which federal reimbursement is unavailable.

Id. at 310.

Thus, the Hyde Amendment -- by denying federal funds for certain abortions -- operates as an overlying exception to the requirements of Title XIX and accompanying regulations, carving out particular services that states are not obligated to cover. Under the 1994 Hyde Amendment, states are not required to fund abortions when the pregnancy is not the result of rape or incest and the expectant mother's life is not at stake.

Importantly, however, the Hyde Amendment does *not* affect states' underlying obligations imposed by Title XIX and federal Medicaid regulations. That is, although the Hyde Amendment relieves states of having to fund abortions

for which federal funding is unavailable, it does not alter states' obligations with respect to abortions for which federal funding *is* available. Because the 1994 Hyde Amendment permits federal funding for abortions to end pregnancies resulting from rape or incest, the only issue here is whether Colorado's funding restriction contravenes the requirements of Title XIX and accompanying regulations.

III

Title XIX requires participating states to provide medical assistance to the "categorically needy" -- individuals who qualify for Medicaid because they receive some form of federal cash assistance (*e.g.*, Aid to Families with Dependent Children or Supplemental Security Income). 42 U.S.C. § 1396a(10)(A)(i); 42 C.F.R. § 436.100-.128. States may also, at their option, cover "medically needy" individuals -- persons who do not qualify as categorically needy but nevertheless cannot afford adequate medical care. 42 U.S.C. § 1396a(10)(A)(ii); 42 C.F.R. § 436.300-.330.

While states have considerable flexibility in determining the scope of their Medicaid coverage, *see* 42 C.F.R. § 430.0; *Beal v. Doe*, 432 U.S. 438, 444 (1977), Title XIX requires states to cover at least seven general categories of medical services for categorically needy individuals, 42 U.S.C. § 1396a(a); *id.* § 1396d(a)(1)-(5), (17), (21); 42 C.F.R. § 440.210. Abortion falls under several of these "mandatory coverage" categories, including "inpatient hospital services," 42 U.S.C. § 1396d(a)(1), "outpatient hospital services," *id.* § 1396d(a)(2)(A), "family planning services," *id.* § 1396d(a)(4)(C), and "physicians' services furnished by a physician," *id.* § 1396d(a)(5)(A).

Participating states are not required, however, to fund *all* medical services falling under one of the mandatory coverage categories. *Beal*, 432 U.S. at 441. Rather, Title XIX "confers broad discretion on the States to adopt standards for determining the extent of medical assistance" offered in their Medicaid programs. *Id.* at 444. In addition, federal Medicaid regulations expressly permit participating states to "place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures." 42 C.F.R. § 440.230(d).

Nonetheless, there are important restrictions on states in their exercise of this discretion. Two of those restrictions are particularly relevant here. First, Title XIX requires participating states to establish "reasonable standards . . . for determining . . . the extent of medical assistance under [their Medicaid] plan which . . . are consistent with the objectives of [Title XIX]." 42 U.S.C. § 1396a(a)(17). Second, state Medicaid plans "may not arbitrarily deny or reduce the amount, duration, or scope of [such] service[s] . . . to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition." 42 C.F.R. § 440.230(c).

IV

Colorado's restriction on abortion funding is essentially a limit based on the patient's degree of medical necessity pursuant to 42 C.F.R § 440.230(d): It restricts Medicaid funding for abortions to those instances when the expectant mother's life is at stake. We conclude that this restriction violates the requirements of federal law -- requirements that Colorado is compelled to follow as a condition of its participation in Medicaid.

First, Colorado's Medicaid program as amended by the abortion funding restriction impermissibly discriminates in its coverage of abortions on the basis of a patient's diagnosis and condition. While 42 C.F.R. § 440.230(c) allows states to use medical need as a criterion for placing appropriate limits on coverage, a state may not single out a particular, medically necessary service and restrict coverage to those instances where the patient's life is at risk. *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 126 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979). Such a "policy denies service solely on the basis of diagnosis or condition, and does so arbitrarily because the denial is not in accordance with a uniform standard of medical need." *Hodgson v. Board of County Comm'rs*, 614 F.2d 601, 608 (8th Cir. 1980) (footnotes omitted). Indeed, "[w]hen a state single outs one particular medical condition . . . and restricts treatment for that condition to life and death situations it has . . . crossed the line between permissible discrimination based on degree of need and entered into forbidden discrimination based on medical condition." *Preterm*, 591 F.2d at 126; *see also Zbaraz v. Quern*, 596 F.2d 196, 199 (7th Cir. 1979) ("We agree with the conclusion of the court in *Preterm* that limiting Medicaid assistance to life-threatening abortions 'violate[s] the purposes of the Act and discriminate[s] in a proscribed fashion.'") (*quoting Preterm*, 591 F.2d at 126), *cert. denied*, 448 U.S. 907 (1980).

Second, Colorado's restriction violates 42 U.S.C. § 1396a(a)(17) because it is inconsistent with the basic objective of Title XIX -- to provide qualified individuals with medically necessary care. The purpose of Medicaid as stated in the Act is to enable states to provide medical treatment to needy persons "whose income and resources are insufficient to meet the cost of *necessary medical services*." *Id.* § 1396 (emphasis added). This circuit, as well as several other courts, has interpreted Title XIX and its accompanying

regulations as imposing a general obligation on states to fund those mandatory coverage services that are medically necessary. *See, e.g., Doe v. Rose*, 499 F.2d 1112, 1114 (10th Cir. 1974) ("The import . . . of [Medicaid's] statutory scheme is that indigents who qualify for Medicaid benefits are to receive all necessary medical and hospital care."); *Weaver v. Reagan*, 886 F.2d 194, 198 (8th Cir. 1989) (holding that Title XIX "require[s] that a state Medicaid plan provide treatment that is deemed 'medically necessary' in order to comport with the objectives of the Act"); *Pinneke v. Preisser*, 623 F.2d 546, 549 (8th Cir. 1980) ("Title XIX . . . mandates that [seven] basic categories of medical assistance be provided to all categotically needy persons when the assistance is medically necessary."); *cf. Beal*, 432 U.S. at 444 (stating that "serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage").[3]

It may be that, pursuant to a generally applicable funding restriction or utilization control procedure, a

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[3] *See also Little Rock Family Planning Servs. v. Dalton*, 860 F. Supp. 609, 616 (E.D. Ark. 1994) ("What Title XIX does is to specify the categories of care . . . that every state Medicaid program must cover when 'medically necessary.'"); *Visser v. Taylor*, 756 F. Supp. 501, 507 (D. Kan. 1990) (holding that the "touchstone" of cases interpreting Title XIX's requirements for coverage "is medical necessity"); *Allen v. Mansour*, 681 F. Supp. 1232, 1237 (E.D. Mich. 1986) ("[T]he medical necessity of the procedure is the touchstone for evaluating the reasonableness of standards in state medicaid plans."); *Montoya v. Johnston*, 654 F. Supp. 511, 513 (W.D. Tex. 1987) (holding that "it would be inconsistent with the objectives of the [Medicaid] Act" for a state to deny funding for "medically necessary treatment"); *Simpson v. Wilson*, 480 F. Supp. 97, 101 (D. Vt. 1979) ("The federal regulations do not permit [a state] to decline to provide medically necessary services.").

participating state could deny coverage for a service deemed medically necessary in a particular case. *See, e.g., Miller v. Whitburn*, 10 F.3d 1315, 1321 (7th Circuit 1993) (stating that a participating state may deny coverage for experimental treatments so long as its definition of "experimental" and its application of the restriction are reasonable); *Charleston Memorial Hosp. v. Conrad*, 693 F.2d 324, 330 (4th Cir. 1982) (holding that a state's annual limits on Medicaid coverage to twelve inpatient hospital days -- which met the needs of 88 percent of Medicaid recipients -- and eighteen outpatient hospital visits -- which met the needs of 99 percent of Medicaid recipients -- was consistent with Title XIX and applicable regulations); *Curtis v. Taylor*, 625 F.2d 645, 651-53 (5th Cir. 1980) (upholding a state's limit on Medicaid coverage to three physicians' visits per month where only 3.9 percent of the state's Medicaid population had required more than three physicians' visits in any one month in the year before the regulation was adopted).[4] But a state law that categorically denies coverage for a specific, medically necessary procedure except in those rare instances when the patient's life is at stake is not a "reasonable standard[] . . . consistent with the objectives of [the Act]," 42 U.S.C. § 1396a(a)(17), but instead contravenes the purposes of Title XIX. *Accord Hodgson*, 614 F.2d at 611; *Zbaraz*, 596 F.2d at 199; *Preterm*, 591 F.2d at 126; *cf. Pinneke*, 623 F.2d at 549 (holding that a state policy creating an irrebuttable presumption that a particular procedure "can never be medically necessary" under certain circumstances

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[4] Importantly, the court in *Curtis* noted that the coverage restriction at issue in that case was "completely unlike state limitations on treatment for abortions to life and death situations. Such limitations single out pregnancy and establish a unique standard governing the provision of necessary medical services for that condition." *Curtis*, 625 F.2d at 652.

was "not consistent with the objectives of the Medicaid statute").

We note that the four other circuit courts to confront similar state restrictions on abortion funding under Medicaid have all concluded that such limitations violate the requirements of federal Medicaid law. *See Edwards v. Hope Medical Group for Women*, 115 S. Ct. 1, 2 (1994) (Scalia, Circuit Justice) (*citing Roe v. Casey*, 623 F.2d 829, 831, 834 (3d Cir. 1980), *Hodgson*, 614 F.2d at 611, *Zbaraz*, 596 F.2d at 199, and *Preterm*, 591 F.2d at 126-27). Two of those courts expressly held that states participating in Medicaid must subsidize all abortions for which federal funds are available. *See Casey*, 623 F.2d at 836 ("Title XIX, as . . . modified [by the Hyde Amendment], requires the states to fund abortions in two categories: where the mother is endangered and where the pregnancy was the result of rape or incest."; *Zbaraz*, 596 F.2d at 199 n.7 (stating that the Hyde Amendment "clearly mandates" that participating states subsidize those abortions for which federal funding is available). The two other courts held that a state's restriction of abortion coverage to those cases where the woman's life is at stake -- when the Hyde Amendment makes federal funding available for a broader class of abortions -- violates the requirements of Title XIX. *See Hodgson*, 614 F.2d at 611 ("Minnesota's welfare scheme, which subsidizes medical assistance services generally but which subjects abortions to a 'life-threatening' standard, is inconsistent with and superseded by Title XIX."); *Preterm*, 591 F.2d at 126 ("We find it 'unreasonable' and wholly' [in]consistent with the objectives of the Act', 42 U.S.C. § 1396a(a)(17), for a state to provide abortion services and then . . . deny it to all those who will not die without it.").

We are also bolstered in our reasoning by several recent district court decisions. Indeed, every federal district court

to consider this precise question since Congress enacted the 1994 Hyde Amendment has concluded that participating states must fund abortions to end pregnancies resulting from rape or incest. *See Fargo Women's Health Org., Inc. v. Wessman*, Civ. No. A3-94-36, slip op. at 25 (D.N.D. Mar. 15, 1995); *Orr v. Nelson*, 874 F. Supp. 998, 1003 (D. Neb. 1995); *Stragler v. Shalala*, No. 94-4221-CV-C-5, 1994 WL 764104 at *5 (W.D. Mo. Dec. 28, 1994); *Planned Parenthood v. Wright*, No. 94 C 6886, 1994 WL 750638, at *2 (N.D. Ill. Dec. 6, 1994); *Elizabeth Blackwell Health Center for Women v. Knoll*, No. 94-CV-0169, 1994 WL 512365, at *1 (E.D. Pa. Sep. 15, 1994); *Hope Med. Group for Women v. Edwards*, 860 F. Supp. 1149, 1154 (E.D. La. 1994); *Little Rock Family Planning Servs. v. Dalton*, 860 F. Supp. 609, 622 (E.D. Ark. 1994); *Planned Parenthood Affiliates v. Engler*, 860 F. Supp. 406, 409-10 (W.D. Mich. 1994); *Planned Parenthood v. Blouke*, 858 F. Supp. 137, 141 (D. Mont. 1994).

Finally, our interpretation of Title XIX and the Medicaid regulations plainly comports with Congress' understanding of the effect of passing the 1994 Hyde Amendment. The floor debates in the Senate and the House of Representatives reveal Congress's understanding that participating states must fund those abortions for which federal funds are available. For instance, Senator Hatch stated that if the Hyde Amendment were repealed, "every State will be required to provide matching funds for abortion on demand." 139 Cong. Rec. S12,581 (daily ed. Sept. 28, 1993). Senator Nickles likewise stated that "removal of the Hyde language would result in mandating that the States pay for these abortions with State dollars. . . . This is not a State opt out. There are no state options. States have to match

the Federal funds." *Id.* at S12,588.[5] In the House, Representative Dornan stated that unless HHS

> designates abortions as an optional procedure, or treats abortion differently from all other Medicaid services by paying for them entirely with Federal funds -- rather than requiring a state match -- [repealing the Hyde Amendment would mean that] States would be required to participate in providing abortions on demand, or lose Federal Medicaid reimbursement.

139 Cong. Rec. H4325 (daily ed. June 30, 1993). And Representative Waxman stated that eliminating the Hyde Amendment would mean that "medically necessary abortions would be required to be performed by the States." *Id.* at H4323.

We acknowledge that Colorado "has legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child." *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804 (1992); *see also Roe v. Wade*, 410 U.S. 113, 162 (1973) (recognizing a state's "important and legitimate interest in . . . protecting the potentiality of human life" in a fetus). We also recognize

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[5] Other senators stated that repealing the Hyde Amendment would "mandate[] taxpayer-funded abortion on demand for Medicaid-eligible women," 139 Cong. Rec. S12,577 (daily ed. Sept. 28, 1993) (statement of Senator Smith), "allow all women in this Nation, regardless of income or status, the ability to exercise their constitutional right to choose," *id.* at S12,575 (statement of Senator Murray), and mean that "Government will get out of the business of intruding into the lives, private lives, of women and let a woman make the decision for herself," *id.* at S12,582 (statement of Senator Mikulski).

that Colorado "has a valid and important interest in encouraging childbirth." *Beal*, 432 U.S. at 445. If Colorado chose not to participate in Medicaid, it would not be required to fund any abortions whatsoever. *Maher v. Roe*, 432 U.S. 464, 469 (1977). But because Colorado has decided to participate and accept federal Medicaid funds, it must do so on the terms established by Congress. So long as Colorado continues to participate in Medicaid, it cannot deny Medicaid funding for abortions to qualified women who are the victims of rape or incest.

V

In sum, we find that Colorado's abortion funding restriction, as stated in Colo. Const. art. V, § 50, Colo. Rev. Stat. §§ 26-4-105.5, 26-4-512, 26-15-104.5, and 10 Colo. Code Regs. § 2505-10 (8.733), violates federal Medicaid law insofar as it denies funding to Medicaid-eligible women seeking abortions to end pregnancies that are the result of rape or incest. So long as Colorado continues to participate in Medicaid, defendant is enjoined from denying Medicaid funding for abortions to qualified women whose pregnancies are the result of rape or incest.[6] Accordingly, we **AFFIRM** the district court's order granting plaintiffs final injunctive relief.

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[6] Again, we understand the district court's injunction as enjoining defendant form enforcing Colorado's abortion funding restriction only to the extent that it conflicts with federal Medicaid law. *See* note 2 *supra*. It is on this basis that we affirm the district court's order.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 93 N 2350

WARREN M. HERN, M.D., GRAND JUNCTION WOMEN'S CLINIC, PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, INC., and MAYFAIR WOMEN'S CENTER,

Plaintiffs,

v.

KAREN BEYE, Executive Director State Department of Social Services, in her official capacity,

Defendant.

ORDER GRANTING FINAL INJUNCTIVE RELIEF

On May 5, 1994, I held a hearing on plaintiffs' request for a preliminary injunction. With the parties' consent, I consolidated that hearing with a hearing on the merits, pursuant to rule 65(a) of the Federal Rules of Civil Procedure. After taking testimony, hearing argument, and reviewing the pleadings submitted in this case, I stated certain findings and conclusions, ruled on pending motions, and orally granted injunctive relief.

The injunctive relief granted was a modified form of the relief requested by plaintiffs. I stated that Colorado

must administer its Medicaid plan in accordance with the requirements of federal law - specifically Title XIX of the Social Security Act, commonly known as the "Medicaid Act," 42 U.S.C.A. §§ 1396-1396v (West 1992 & Supp. 1994) - *so long as Colorado continues to receive federal monies pursuant to the Medicaid Act.* I refused to re-draft Article V, Section 50 of the Colorado Constitution. *See, e.g., Roe v. Casey*, 623 F.2d 829, 836-37 (3d Cir. 1980). Since that constitutional provision is inconsistent with federal law, I enjoined defendant from enforcing it, so long as the State of Colorado accepts federal money pursuant to the Medicaid Act.

I also enjoined defendant from enforcing certain Colorado statutes and regulations which purport to implement Article V, Section 50, insofar as those state statutes and regulations are inconsistent with the Medicaid Act and implementing federal regulations. Although neither side cited Colo. Rev. Stat. § 26-4-105 (1989) in briefs, motions, or pleadings, it appears to me that this statute accomplishes the same end as the court's oral injunction. It provides:

> Nothing in this article [The Colorado Medical Assistance Act] shall prevent the state department from complying with federal requirements for a program of medical assistance in order for the state of Colorado to qualify for federal funds under Title XIX of the social security act and to maintain a program within the limits of available appropriations.

Id. Although I think this statute could not override the state constitutional provision, it does appear to clarify defendant's authority once enforcement of the

constitutional provision is enjoined: she is to administer the Colorado Medical Assistance Act in compliance with federal requirements for a program of medical assistance. Moreover, there is nothing in my injunction which mandates that she go *beyond* federal requirements. *See Harris v. McRae*, 488 U.S. 297, 310 & n.15, 100 S. Ct. 2671, 2684 & n.15 (1980) ("Thus, by the normal operation of Title XIX, even if a State were otherwise required to include medically necessary abortions in its Medicaid plan, the withdrawal of federal funding under the Hyde Amendment would operate to *relieve* the State of that obligation for those abortions for which federal reimbursement is unavailable." [emphasis added]). The issue was not presented, and I did not decide what (if any) additional requirements are imposed by state law.

Based on the findings and conclusions stated in open court on May 5, 1994, and upon Colo. Rev. Stat. § 26-4-105, it is

ORDERED as follows:

(1) Plaintiffs' request for a preliminary injunction is DENIED.

(2) Defendant's motion to dismiss is DENIED.

(3) Plaintiffs' motion for summary judgment is GRANTED, in part.

Defendant is enjoined, so long as the State of Colorado accepts federal funds under the Medicaid Act, from enforcing the provisions of Article V, Section 50 of the Colorado Constitution. Defendant is further enjoined from enforcing Colo. Rev. Stat. §§ 26-4-105.5, 26-4-512, or 26-15-104.5, or any rules and regulations implementing

these statutes, *insofar as those statutes or rules are more restrictive than the terms of the current Hyde Amendment,* Pub. L. No. 103-122, § 510, 107 Stat. 1113 (1993). Defendant is free to follow Colo. Rev. Stat. § 26-4-105 by "complying with federal requirements for a program of medical assistance necessary for the state of Colorado to qualify for federal funds under Title XIX of the social security act," as amended by the current Hyde Amendment.

(4) This injunction shall constitute the final judgment of this court.

(5) Upon a finding that plaintiffs would continue to suffer irreparable injury were the court's injunction stayed pending appeal and that such injury outweighs the harm to defendant which would be occasioned if the stay were denied, defendant's oral motion for a stay of this injunction is DENIED.

Dated this 12 day of May, 1994, *nunc pro tunc* May 5, 1994.

BY THE COURT:

/s/
EDWARD W. NOTTINGHAM
United States District Judge